ETHICS ADVISORY OPINION

12-08

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

The question involves a title insurance company's audit of the files and records of an attorney or law firm that writes title insurance for that title insurance company. Historically, the audits were performed on site, and an employee of the title company would perform the audit. Recently, the title company has contracted with a third party to conduct off-site audits that would require information sent via email. The proposal contemplates that this transmission would be done via a secure address but does not state how it would be set up. The information requested goes beyond trust accounts to operating accounts and business tax returns. At the time of closing, the client/purchaser (but not the seller) signs a release form that informs the client that the file may be audited. However, there may be pending funds in the trust account for future closings in which the attorney is acting in a fiduciary capacity and does not have permission to share information.

Question Presented:

Does an off-site desk review of attorney trust accounts violate Rule 1.6 (Confidentiality of Information)?

Summary:

Each instance must be viewed on its own terms and reviewed to ensure that adequate steps have been taken to preserve confidentiality of information. When the off-site audit is properly conducted, there would be no violation. Because every off-site audit could be different and every title insurance company or attorney/law firm could have different specific facts, an overall answer is not possible.

Opinion:

Many attorneys and law firms who perform real estate closing services also serve as agents for title insurance companies. The attorney issues a binder or commitment to provide title insurance for the real estate transaction and receives a premium that is divided between the attorney and the title insurance company. The attorney may serve, therefore, in the dual role of being an agent of the title insurance company and the representative for the client purchasing the title insurance. Normally, the person or entity purchasing the title insurance signs a disclaimer form which acknowledges this relationship and authorizes the release of information for audit purposes.

Financial information concerning an attorney's trust account will often contain confidential information about specific clients and transactions. Rule 1.6 prohibits the disclosure of client information except in very limited circumstances. For purposes of the question presented, there is no dispute whether or not a title insurance company would be allowed to access information about clients for whom a title insurance policy was issued. The concern is whether a disclosure to the title insurance company about transactions in which the title insurance company is not yet involved, or may never be involved, violates a duty of confidentiality.

If a title insurance company representative in an on-site audit requested to review files in which title insurance was not involved, the attorney would refuse to allow access. The procedure should be the same for an off-site audit wherever possible. It is not feasible to establish a completely separate trust account for each client and transaction, but it is advisable to have a trust account that is used exclusively for real estate transactions which is separate from any other trust account that is used for tort cases or other purposes. Within that real estate trust account, allowing an auditor to view total balances and confirm basic reconciliation is permissible since there is no data involved which would identify a specific client. If the auditor, whether on-site or off-site, requests specific data related to a transaction involving the title insurance company, it should be granted to the extent allowed by the disclosure form signed by the client.

When establishing the trust account and the accounting methods to be used for the account, the attorney should take into consideration the eventual need for an audit by the title insurance company. A method should be in place to comply with the audit and provide specific data about any transaction involving the title insurance company. This will also prevent the disclosure of specific information that is not related to the title insurance company. Overall data, such as total balances in the account, do not disclosure data specific to a client. Due to the fact that each bank which handles a trust account for the attorney, each accounting method used by an attorney, and each title insurance company's requirements will likely differ, it is not feasible to give a definite answer. However, the following practice tips should help an attorney ensure that no confidential information is disclosed inappropriately.

It is a better practice if real estate transaction funds are maintained in a trust account that is separate from any other trust account. If feasible, a separate trust account could also be created for transactions that involve title insurance, and when a transaction begins to involve title insurance, it can be moved from the regular trust account to the title insurance transaction trust account. However, that may be too cumbersome for many attorneys.

An attorney should request that the title insurance company notify him/her of the data that will be needed in the audit, whether on-site or off-site, so that files may be properly structured and prepared from the start. It is much easier to set things up correctly than to have to go back and rearrange procedures.

Information may be transmitted by e-mail or other electronic means provided reasonable care is taken to ensure the security of the information and to prevent misdelivery of the information. (Comment 18 to Rule 1.6 provides more guidance.)

If a title insurance company requests information about transactions in which title insurance was not involved, the attorney should carefully consider the exact facts before releasing that information.

An attorney who is holding "pending funds" such as seller purchase price funds or other pre-closing funds in a trust account in which title insurance is not yet involved should treat that information as not involving the title insurance company until a title insurance binder or policy is written. The accounting method should allow the amount being held to be disclosed without disclosing the names of the parties or other details.

Attention is directed to S. C. Bar Ethics Adv. Op. #97-22 which discussed the confidentiality issues of an attorney submitting insurance company bills directly to a third party auditor. In that opinion, although it was deemed permissible to forward a specific insurance company's bills to the third party auditor (with the consent of the insurance company and the client), it was pointed out that bills to other insurance companies should not be transmitted without informed consent from those other insurance companies.